Office of Chief Counsel Internal Revenue Service

memorandum

CC:NER:CTR:HAR:TL-N-7359-99 CJSantaniello

date:

DEC FOR the

to: Chief, Examination Division

Connecticut-Rhode Island District

Attn: Revenue Agent Rick Mika, Group 1108, through Case Manager Pat McGovern

from: District Counsel, Connecticut-Rhode Island

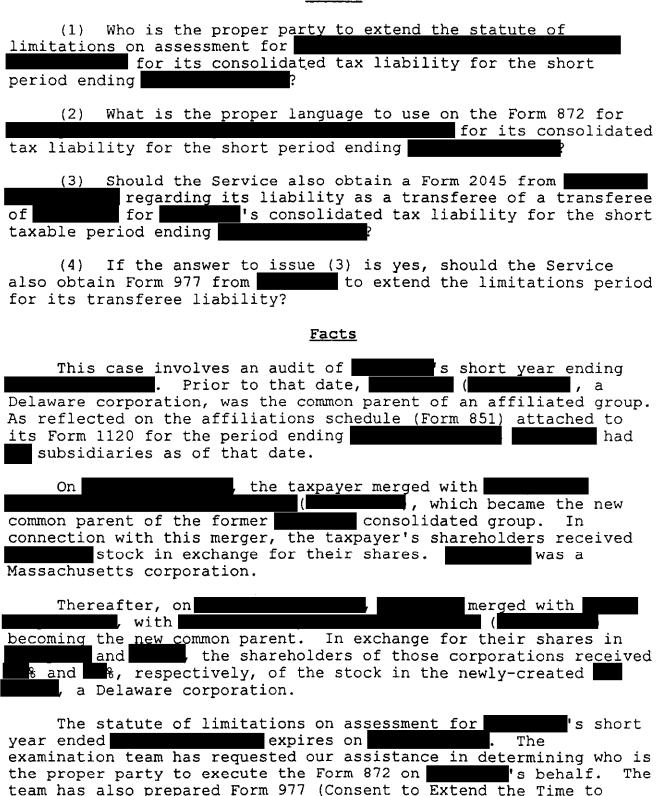
ject: Large Case Advisory Opinion -

THIS DOCUMENT INCLUDES CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE SERVICE, INCLUDING THE SUBJECT TAXPAYER. THIS DOCUMENT ALSO CONTAINS TAX RETURN INFORMATION SUBJECT TO THE PROVISIONS OF I.R.C. § 6103 AND ITS USE WITHIN THE SERVICE SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW IT.

We are responding to your memorandum dated December 2, 1999, in which you request legal advice regarding the appropriate manner to extend the statute of limitations for , which no longer exists, for its short year . For the reasons set forth below, we ending believe that , a successor of 's successor, is the proper party to extend the limitations period for 's consolidated tax liabilities for the period in question. We, therefore, recommend that you obtain Form 872 , which is (using the language set forth below) from primarily liable for seems 's tax liability for that year. Although we do not believe it is necessary for to agree to assume and pay seems 's consolidated liability in this case as a transferee because it is already primarily liable for the tax, you may obtain a signed Form 2045 from if you wish to do so out of an abundance of caution. We do not, however, recommend that you obtain Form 977 from at this time.

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if necessary, we will send you a supplemental memorandum incorporating any such recommendation.

Issues



Assess Liability at Law or in Equity for Income, Gift, and Estate

Tax Against a Transferee or Fiduciary) and Form 2045 (Transferee Agreement), requesting that we review the proposed language on those forms. Under the Form 2045, agrees to assume and pay all of sconsolidated tax liabilities for its short year ending

Discussion

(1) <u>Forms 872</u>

Under I.R.C. § 6501(c)(4), the Service and the taxpayer may consent in writing to extend the time for making an assessment if the consent is executed before the normal period of assessment or a previously-extended period expires. The regulations under section 6501(c)(4) do not specify who may sign consents executed under that section with respect to consolidated returns. Instead, the rules pertaining to statute extensions for consolidated returns are contained in Treas. Reg. § 1.1502-77(a) and Temp. Treas. Reg. § 1.1502-77T.

The common parent of a consolidated group is the sole agent for each subsidiary in the group for all matters regarding the tax liability for the group's consolidated return year. Treas. Reg. \$ 1.1502-77(a). This agency continues for as long as the common parent remains in existence under state law, even if consolidated returns are not filed in subsequent years or corporations join or leave the group. Treas. Reg. \$ 1.502-77(a); Craigie, Inc. v. Commissioner, 84 T.C. 466, 474 (1985). Thus, the common parent is generally the proper party to sign consents to extend the period of limitations on assessment for all members of the group. Treas. Reg. \$ 1.1502-77(a).

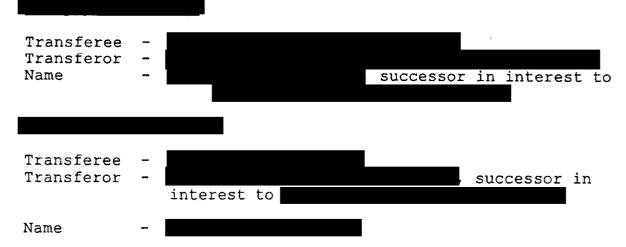
This general rule does not apply when the common parent is no longer in existence. Under this rule, if the common parent no longer exists, a waiver of the statute of limitations may be signed by an "alternative agent," as defined in Temp. Treas. Reg. § 1.1502-77(a)(3). Under Temp. Treas. Reg. § 1.1502-77(a)(4)(ii), a waiver may be signed by "[a] successor to the former common parent of the group in a transaction to which section 381(a) applies."

In this case, when merged into on it ceased to exist under Delaware law on that date. See 8 Del. Code § 259(a) (1996). Because the merger under Delaware law qualifies as a reorganization under I.R.C. § 368(a)(1)(A), it is a transaction to which I.R.C. § 381(a) applies. Thus, as the surviving corporation, became an "alternate agent" for the taxpayer under Treas. Reg. § 1.1502-77T(a)(4)(ii).

As noted above, however, no longer exists by virtue
of the merger with in which
became the new common parent. See Mass. Gen. Laws Ann.,
chapter 156B, § 80(a)(1) (1992). Because the merger constitutes a
transaction to which section 381(a) applies, became
's alternative agent under Temp. Treas. Reg.
§ 1.1502-77T(a)(4)(ii), and thus the proper party to execute the
Form 872 on behalf of for its short period ending
. Although Temp. Treas. Reg. § 1.1502(a)(4)(ii) does not
expressly include a successor of a successor as an alternative
agent, we believe that the reference to "[a] successor of the old
common parent" is sufficiently broad to include as as
's alternative agent. See generally Bardarracco v.
Commissioner, 464 U.S. 386 (1984) (statutes of limitation must be
strictly construed in favor of the government). We, therefore,
recommend that execute the Form 872 with the following
language at the top of page one:
(EIN), as successor in
interest of (EIN
successor in interest of
(EIN , and as agent for the
group*.
$\mathcal{J} = \mathcal{J} + \mathcal{J} \mathcal{L}$
[at the bottom of the form]
* regarding the consolidated tax liability of the
* regarding the consolidated tax liability of the group for
* regarding the consolidated tax liability of the
* regarding the consolidated tax liability of the group for the consolidated return year ending
* regarding the consolidated tax liability of the group for the consolidated return year ending This language makes it clear that is signing both in
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1967); Sanderling, Inc. v. Commissioner, 66 T.C. 743, 746 n4 (1976). The Form 2045 does not, however, operate to extend the statute of limitations on assessment against

As successor in the source merger, is primarily liable for source source. Some short period ending source source. Mass. Gen. Laws Ann. chapter 156B, \$ 80(b). Accordingly, the Form 2045, which would impose secondary liability as a transferee, is unnecessary in this instance. If, however, you desire to secure Forms 2045 from and source, we suggest that you use the following language:



The period for assessing initial transferee liability expires within one year after the period of assessment against the transferor expires. I.R.C. § 6901(c)(1). In the case of the liability of a transferee of a transferee, the limitations period expires one year after the expiration of the limitation for assessment against the preceding transferee. Section 6901(c)(2). Thus, the statute of limitations on transferee liability expires for and on and and for on and and for any on the secured from both and before

(c) <u>Form 977</u>

Form 977 is used to extend the statute of limitations on transferee liability. As previously discussed, the statute of limitations for statute of statute of statute in statute

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defeats the purpose of obtaining the extension in this case.

Furthermore, since the limitations period does not expire against for at least months, we suggest that you refrain from obtaining a Form 977 from that corporation until a point in time more proximate to

Since there is no further action required by this office, we are closing our file in this matter. Please call Carmino J. Santaniello at (860) 290-4075 if you have any questions or require further assistance.

GERALD A. THORPE District Counsel

By: _____

CARMINO J. SANTANIELLO Attorney